

Served: June 17, 1992

NTSB Order No. EA-3593

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 13th day of May, 1992

LOUIS KUHN, JR.,

Applicant,

v.

88-EAJA-SE-9232

BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Respondent.

**ORDER DISMISSING APPEAL**

The Administrator has moved to dismiss the notice of appeal in this proceeding because it was not, as required by Section 821.47 of the Board's Rules of Practice,<sup>1</sup> (49 CFR Part 821) filed by the applicant within 10 days after the law judge, on May 1, 1990 issued a decision and order denying the applicant's request for attorney fees and expenses under the Equal Access to Justice Act. We will grant the motion.

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<sup>1</sup>Section 821.47 provides as follows:

"§821.47 Notice of Appeal.

A party may appeal from a law judge's order or from the initial decision by filing with the Board and serving upon the other parties (pursuant to §821.8) a notice of appeal within 10 days after an oral initial decision or an order has been served."

In reply to the motion to dismiss, the applicant, who did not file his notice of appeal until May 14, suggests that the reason he was late is that, contrary to prior instruction that his business address be used, the law judge's decision was sent to his former home address, a circumstance that resulted in his not receiving the decision until May 10.<sup>2</sup> We do not agree that the Board's mistake in mailing the decision to the applicant excuses his failure to file a timely notice of appeal, for while the mismailing left the applicant with less time to act, it did not prevent him from filing a notice, or a request for an extension of time to file one, by May 11, when the 10 day period expired.

As it appears that the applicant's failure to file a timely notice of appeal is not excusable for good cause shown, his appeal will be dismissed. See Administrator v. Hooper, NTSB Order EA-2781 (1988).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's motion to dismiss is granted, and
2. The applicant's appeal is dismissed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, and HAMMERSCHMIDT, Members of the Board, concurred in the above order. Member HART submitted the following dissenting statement.

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<sup>2</sup>The decision was returned to the Board by the Postal Service and remailed to the applicant at the new residence address the Service had provided. The applicant received the decision at the new home address.

DISSENTING STATEMENT BY     ME - 3  
FOR NOTATION NO. 5738  
May 19, 1992

Dissent by Member Hart:     Procedural compliance is unquestionably essential to the fair and efficient operation of a system such as our certificate action appeal process, and I agree with the normal strictness of application of appeal deadlines.

In the instant case, however, after respondent had properly notified us of his new address, most of his ten days to appeal was consumed by our mailing the decision to his prior address, followed by our roiling it to him again. After that back and forth, he did not receive the decision until Thursday, May 10 -- the day before his appeal time expired.

Because the mailing mistake was ours, and because respondent reacted diligently to our mistake, I am compelled to dissent. I would deny the motion to dismiss the appeal because we are being unthinkingly and unwisely rigid by dismiss-, for untimeliness, an appeal by a pro se respondent who received our decision on Thursday (probably afternoon or at least late morning) and then, instead of filing a notice of appeal the next day, filed it on Monday, the next business day after that.